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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL SAMARA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the six-year statute of limitations applicable to criminal tax prosecutions (26 U.S.C. §6531) permits the prosecution of an attorney for understating income received from his legal practice more than six years after he filed the return containing the alleged understatement solely because he subsequently filed an amended return which concerned a totally unrelated (and unchallenged) aspect of his income for that year.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. 1a-7a, *infra*) was filed on March 4, 1981, and is reported at 643 F.2d 701. Unreported pretrial rulings of the District Court and the Court of Appeals respecting the statute-of-limitations issue are reproduced at Pet. App. C., pp. 11a-12a, *infra*, Pet. App. D, pp. 13a-18a, *infra*, and Pet. App. E, pp. 19a-21a, *infra*, respectively.

JURISDICTION

The decision of the Court of Appeals was issued on March 4, 1981. A timely petition for rehearing was denied on March 31, 1981. Pet. App. B, p. 9a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent sections of the Internal Revenue Code, 26 U.S.C. §§6501(a), 6501(c)(1)-(3), 6511(a), 6513(a), 6531(2), (5), 7201, 7206(1) (1976) are reproduced at Pet. App. F, pp. 23a-25a, *infra*.

STATEMENT

This case presents a single narrow legal issue which is important both to the administration of the tax laws and to the criminal justice system. It rests on a few relevant and easily summarized facts. The issue is whether a taxpayer may be prosecuted after the statute of limitations has expired on his original tax return because he filed, within the limitations period, an amended tax return for a purpose wholly unrelated to the government's criminal case, and containing no additional representation relevant in any manner to the government's allegation. The lower court's disposition conflicts in principle with this Court's recent decisions sustaining the important policy of repose on which criminal statutes of limitations are based. The disposition below also conflicts with this Court's rulings respecting the effect of amended tax returns on the parallel statute of limitations applicable to *civil* tax cases.

1. The Facts.

Petitioner is an attorney in Oklahoma City, Oklahoma, who had never before been charged with a criminal offense. He was convicted after a trial by jury on a four-count indictment relating to his tax returns for the years 1971 and 1972 and was sentenced to serve three years' imprisonment and to pay a total fine of $15,000. The first count of the indictment charged that in his 1971 return petitioner understated the gross income from his legal practice in violation of 26 U.S.C. §7206(1). The second count alleged that this conduct constituted tax evasion under 26 U.S.C. §7201. Counts 3 and 4 of the indictment charged parallel offenses with respect to the 1972 tax returns. The proof, which consisted principally of the testimony of many clients whom petitioner had represented in 1971 and 1972, related to fees or other payments allegedly made to petitioner by these clients which were not accounted for in the records which he had provided to his accountants.

The indictment was returned on January 4, 1979, more than six years after September 14, 1972, when petitioner filed his Form 1040 for 1971.[1] That return included Schedule C-1, which stated petitioner's income in 1971 from his legal practice. Petitioner filed an amended tax return (Form 1040X) on October 15, 1973. The only change made on the amended return was that a depreciation deduction for a restaurant owned by petitioner was moved into the 1971 tax year. See Trial Transcript, pp. 330-331. Petitioner's amended tax return included photostatic copies of some of the schedules accompany-

[1] Petitioner had refused to accede to the Internal Revenue Service's request that he sign a written waiver of the statute of limitations. *See* the Government's Response to Motion to Dismiss dated January 25, 1979, p. 11.

ing his original tax return, including the original Schedule C-1. In accordance with the format of IRS Form 1040X, the amended return also accurately recorded, in the space provided on the face of the form, certain of the income figures reported on the original return, and specified the net change caused by the amendment.[2] At the time petitioner filed his amended tax return, he had been informed that the Internal Revenue Service had begun or would commence an audit on his original 1971 tax return. *See* Plaintiff's Exhibit 5.

2. The Rulings Below.

Prior to trial, petitioner moved to dismiss the counts of the indictment relating to 1971 on statute-of-limitations grounds. The district court noted, *inter alia*, that "[w]e have not been cited to, nor does our research disclose, any case which deals with the statute of limitations under §6531 vis-á-vis an amended return" (Pet. App. D, p. 17a, *infra*). The district court declined to rely on case law respecting statutes of limitations applicable to civil cases, and denied petitioner's motion to dismiss. Pet. App. D, pp. 13a-18a, *infra*. Petitioner unsuccessfully pursued a pretrial appeal, which the court of appeals dismissed on jurisdictional grounds. Pet. App. E, pp. 19a-21a, *infra*. Following his conviction, petitioner raised the issue again on appeal. The court of appeals affirmed the conviction, reasoning as follows (p. 6a, *infra*):

> IRS filed the amended return and recognized the increased depreciation claim. *Norwitt* v. *United States*, 9 Cir., 195 F.2d 127, 134, and *Levy* v. *United States*, 3 Cir., 271 Fed. 942, 943, hold that a

[2] IRS Form 1040X has a column requiring the taxpayer to repeat, *inter alia*, certain of the total income, deduction, and tax figures "[a]s originally reported or as adjusted. . . ." *See* Plaintiff's Exhibit 5.

person may be prosecuted for filing an amended return. We agree. An amended return is "any return, or other document" within the purview of §7206(1) and may constitute an attempt to defeat or evade a tax "in any manner" within the proscription of §7201. Accordingly, the statute is no bar.

REASONS FOR GRANTING THE WRIT

The conclusions of the courts below conflict with two lines of decision rendered by this Court. *First*, this Court has repeatedly confirmed and applied the important policies of repose which underlie criminal statutes of limitation and has recognized that these policies are "fundamental to our society and our criminal law." *Bridges* v. *United States*, 346 U.S. 209, 215-16 (1953). By permitting petitioner to be prosecuted in 1979 for allegedly underreporting income in 1971, merely because he submitted an amended tax return in 1973 which had no relevance whatever to the offense with which he was charged, the courts below have failed to give the governing statute of limitations the liberal interpretation which this Court has required. *Second*, this Court has clearly held, in a number of rulings in the *civil* tax area, that the applicable limitations period is not tolled or otherwise affected by a taxpayer's submission of auxiliary reports or returns which do not bear on the subject at issue between the taxpayer and the Internal Revenue Service. The district court explicitly refused to apply this line of decisions to a criminal tax prosecution,[3] thereby subjecting a taxpayer more readily to criminal punishment than to civil tax liability.

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[3] The district judge made his position clear when he explained, in the course of the trial (Trial Transcript, p. 1800):

> My judgment is that I couldn't sustain it, the statute of limitations problem, well briefed, well argued. I just don't think the civil position that was taken by the Court of Appeals applies in criminal cases.

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1. The Policies of Repose.

This Court has consistently recognized that the important policies of repose embodied in criminal statutes of limitations require that such statutes be construed liberally. *See, e.g., United States* v. *Marion*, 404 U.S. 307, 322-23 (1971); *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970); *Bridges* v. *United States*, 346 U.S. 209, 215-16 (1953); *United States* v. *Scharton*, 285 U.S. 518, 522 (1932). That governing principle was stated in *United States* v. *Habig*, 390 U.S. 222, 227 (1968), to be applicable to the statute of limitations involved in this case — 26 U.S.C. §6531.

In the *Habig* case, this Court held that the six-year period prescribed by Section 6531 begins to run no earlier than the date when the accused "committed the acts upon which the crimes were based." 390 U.S. at 225.[4] The issue in this case is the converse of *Habig*: Is the limitations period tolled or extended beyond six years from the date of "the acts upon which the crimes were based" because the taxpayer filed an irrelevant amended return after the date on which he allegedly committed the offense?

No rational administration of the important policies of repose justifies such a result. Indeed, the six-year limitations period prescribed by the Internal Revenue Code for the tax offenses at issue here has been singled out by this Court as one which should be carefully administered and not subjected to artificial enlargement.

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[4] The issue in *Habig* was whether the limitations period begins to run when a tax return is due even if the taxpayer has been granted an extension of time and does not, therefore, file the return by the statutorily prescribed date. This Court concluded that Congress must have intended not to begin the limitations period until the actual filing of the return.

That is true because the six-year limitations period is an exception to the shorter limitations period which governs other offenses. *See United States* v. *McElvain*, 272 U.S. 633, 639 (1926); *United States* v. *Scharton*, 285 U.S. 518, 521-22 (1932); *cf. United States* v. *Reina*, 172 F. Supp. 113, 119-20 (S.D.N.Y. 1959).

In this case, the government's circumvention of the statutory six-year period from the date of the filing of the return was particularly prejudicial. The prosecution's proof with regard to the 1971 return was largely the testimony of clients who had retained petitioner in 1971, and who testified that they had paid him amounts in cash or by check which were not reflected on schedules drawn up from petitioner's books and records. The amounts involved were relatively small dollar amounts. Petitioner was placed at an enormous disadvantage in trying to reconstruct these small financial transactions which had occurred eight years before the trial.[5] In many instances, petitioner had given fees to co-counsel, absorbed costs of bail bonds, and incurred other court expenses in the defense of his clients. By the time of the trial in 1979, records were no longer available, and individual memories of these minor transactions had long faded. It was, therefore, an unfair violation of the letter and intent of the statute of limitations to prosecute petitioner for the 1971 offenses when more than six years had elapsed since he had filed the original representation of the income from his law practice for that year.[6]

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[5] The total amount of tax owed on the unreported income, according to the prosecution's summary witness, was $1,155.38 for 1971 and $3,613.64 for 1972. Trial Transcript, p. 1767.

[6] Petitioner's sentence on the counts of the indictment respecting the 1971 tax year were concurrent with his sentence on the 1972 tax-year counts. The lower court declined to rely on the government's "alternative argument that the concurrent sentence doctrine should be applied," ruling instead on the merits of petitioner's statute-of-limitations claim. Pet. App. A, p. 6a, *infra*. [footnote continued]

2. The Civil Tax Limitations Period.

In its *Marion* decision, this Court observed that "[t]he policies behind civil statutes of limitations are in many ways similar" to those of criminal limitations provisions. 404 U.S. at 322 n.14. In the analogous civil tax area, this Court has made it clear that a limitations period cannot be artificially extended by the tactic utilized here by the government. *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934), concerned the civil limitations period applicable to a tax return filed in July 1925 and supplemented by an amended return — filed after the enactment of a new law — in May 1926. The amended return merely stated that additional tax was due in a manner which did not relate to the deficiencies which the Internal Revenue Service wished to assert with respect to the 1925 return. This Court held unanimously, in an opinion by Justice Cardozo, that "the period of limitation began to run on the filing of the first return, and a return for additional taxes, even if filed afterwards, was an amendment or supplement which did not toll the statute." *Id.* at 186. *See also Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934); *cf. United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933); *Florsheim Brothers Drygoods Co.* v. *United States*, 280 U.S. 453 (1930) (Brandeis, J.).

Petitioner's trial on Counts 3 and 4 of the indictment was plainly affected by the substantial evidence presented by the government with respect to 1971 — the year involved in Counts 1 and 2. Because the lower courts rejected petitioner's statute-of-limitations claim on the merits, this issue was not decided below. Consequently, the concurrent sentences should not bar review of this issue. If this Court grants the writ and reverses the convictions on Counts 1 and 2, the appropriate disposition would be to reverse the convictions altogether because of the unfair prejudice resulting from the 1971 testimony or, at the least, to vacate and remand the convictions on Counts 3 and 4 under 28 U.S.C. §2106 for initial consideration of the issue by the court of appeals. *See Benton* v. *Maryland*, 395 U.S. 784, 798 (1969).

It is clear that under the *National Paper Products* decision, the filing of a non-material amended return could not extend a civil statute of limitations. But under the reasoning of the courts below, the filing of the non-material amended return *did* extend the statute of limitations for criminal tax purposes. This result is so anomalous as to be patently erroneous.

Nor is the result sustained by the reasoning set out in the opinion of the court of appeals, quoted at pp. 4-5, *supra*. The court of appeals asserted that since the amended return may itself be the subject of a criminal prosecution, it may also extend the limitations period. But this is not a case — as the court of appeals' cited cases of *Norwitt* v. *United States*, 195 F.2d 127 (9th Cir.), *cert. denied*, 344 U.S. 817 (1952), and *Levy* v. *United States*, 271 F. 942 (3d Cir. 1921), appear to have been — in which an amended return contained a new false representation, thereby making the filing of the amendment a new criminal act.[7] In such a case, the limitations period assuredly begins with the filing of the false representation in the amended return. But where the amendment simply repeats — as Form 1040X requires the taxpayer to do — the challenged information, contained in the original return, it does not and cannot constitute a new offense.

3. Analogous Cases.

The proper rule of law is to permit a criminal prosecution to be instituted within six years of the date on which the taxpayer filed the tax return in which he underreported his income. Such a rule affords the

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[7] *See United States* v. *Smith*, 13 F.2d 923 (W.D.La. 1926), which discusses *Levy*. The taxpayers' contentions in *Norwitt* and *Levy* appear to have been that an amended return could never support a prosecution. The statute of limitations was not an issue in the *Norwitt* and *Levy* cases.

government the full limitations period in which to investigate and determine whether the representation made in the return is correct and, if it is not, to institute criminal proceedings.

This functional approach was followed by the Third Circuit in the analogous circumstances of *United States* v. *DiSantillo*, 615 F.2d 128 (3d Cir. 1980). In that case, the defendant had illegally re-entered the United States more than five years before he was indicted, but he had been "found" in the country within five years of his indictment. The prosecution contended that the limitations period began at the moment he was "found," as specified in the explicit language of the statute defining the substantive offense. *Id.* at 132. The court rejected that argument in favor of a functional approach which reconciled the policies of repose sustained in *Toussie* v. *United States*, *supra*, with the legitimate law enforcement needs of the immigration authorities. The court held that if an alien enters through a recognized port of entry, "[t]he immigration authorities knew of his entry and could have, through the exercise of diligence typical of law enforcement authorities, discovered his violation at that time." *Id.* at 135. But it held that if the entry by the alien is "surreptitious and not through an official port of entry," the immigration authorities have no opportunity to commence their investigation, and the limitation period then begins only when the alien is "found." *Id.* at 137. The court said in language appropriate here (*id.* at 135):

> The purpose of the statute of limitations is to balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past.

The decision in *United States* v. *Bridell*, No. 58 CR 475 (N.D. Ill. Nov. 20, 1958), follows the same course.

The *Bridell* case concerned a defendant who had been charged with tax evasion as a consequence of filing a corporate income-tax return. The corporate return, filed within the six-year limitations period, represented his and his wife's income to be the same as that set forth in their joint individual tax return which had been filed more than six years prior to their indictment (p. 28a, *infra*). The district court dismissed the tax evasion charge because the two tax returns really related to "the *same act*," and "[t]he act which constitutes the offense in the case at bar was the filing by the defendant of a joint income tax return on March 14, 1952, which was aggravated by the subsequent filing by the defendant as a corporate officer of a corporate income tax return." P. 34a, *infra* (emphasis in original)[8]. The court rejected the Government's contention that the limitations period should begin with the filing of the corporate return for the following reason (p. 34a, *infra*):

> Such a construction as urged here by the Government would enable the Government to continue the statute of limitations indefinitely by using any false statement in regard to a past tax evasion as a reviving of the statute of limitations.

Petitioner's case is stronger than *Bridell* because the amended return in this case was filed for a purpose wholly unrelated to the government's criminal charge, and the filing accurately repeated the representations previously set forth in the original return, as required by Form 1040X. The separate filing of a false corporate return would appear to provide a greater justification for independent criminal liability than the conduct of petitioner in filing an amendment to a personal tax return.

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[8] The transcript of the district court's opinion in *Bridell* is reproduced as Appendix G. pp. 27a-37a, *infra*.

Finally, in assessing the policy implications of the lower courts' rulings, it is noteworthy that the effect of extending a limitations period whenever an amended return is filed is to deter taxpayers not otherwise subject to audit or investigation from voluntarily filing amended returns, even for wholly legitimate tax purposes. Thus, the courts should be slow to impose severe consequences, such as the lower courts did here, on the filing of correct and valid amendments to tax returns previously filed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1989

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CARROLL SAMARA, *Defendant-Appellant.*

Appeal From The United States District Court For The Western District Of Oklahoma
(D.C. No. 79-00015)

(Filed March 4, 1981)

William S. Price (Larry D. Patton, United States Attorney, with him on the brief) for Plaintiff-Appellee.

Robert W. Pittman (John C. Moran, James W. Bill Berry of Berry, Baron & Berry, with him on the briefs) for Defendant-Appellant.

Before SETH, BREITENSTEIN and SEYMOUR, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

A jury found defendant-appellant Carroll Samara guilty on all four counts of an indictment charging income tax violations arising from returns for the years 1971 and 1972. Counts I and III charged the filing of false returns in violation of 26 U.S.C. §7206(1) and Counts II and IV charged the evasion of tax in violation of 26 U.S.C. §7201. Defendant was sentenced to three year concurrent prison terms on each count. Fines totalling $15,000 were imposed. He appeals and we affirm.

Defendant, a practicing lawyer in Oklahoma City, Oklahoma, filed joint returns with his wife who was not indicted. The Internal Revenue Service, IRS, had audited defendant's returns for several years before those for the years in question. The returns were prepared by lawyers and a certified public accountant in an Oklahoma firm. Defendant furnished the information on which the returns were based. The filing and bookkeeping in defendant's office were primitive and haphazard. A substantial portion of his receipts were in cash or in checks which were converted to cash and not deposited in his bank account. Some business expenses were paid by check and some by cash.

Receipt records being unavailable, the return preparers added the expense items to an estimated sum for living expenses to arrive at gross income. The amended return for 1971 showed a tax due of $585.00, Gov't. Ex. 5, and for 1972 of $11,314.26, Gov't. Ex. 6. The government evidence showed an additional tax of $1,155.38 for 1971 and $3,613.64 for 1972 (see Gov't. Ex. 198 as corrected by witness Bonifield, Tr. 1767-1769).

The government relies on "specific items" of unreported income. In a jury trial covering about three weeks, the government presented over 200 witnesses and 200 exhibits. Oklahoma state court records showed the appearance of defendant as attorney for various litigants. Some of these, about 200, testified to the payment of fees to the defendant. The government summary of the evidence, Gov't. Ex. 194, showed additional unreported gross receipts from these sources of $30,154.37 for 1971 and of $36,200.19 for 1972. Detailing the evidence would serve no good purpose. A few examples will suffice.

Mrs. Leo Feurborn testified that in 1971 she paid defendant checks totalling $555.00 for representing her son in a criminal case. Only one check for 05.00 was deposited to defendant's bank account. Tr. 531-536. Lynn Bailey said that she gave defendant a $650.00 check for legal services in a

criminal case. The check was endorsed by defendant but no claim is made that it was deposited in his bank account. Tr. 406-410 and Gov't. Ex. 73. Lyle Fair gave defendant a check for $750.00 in part payment of legal services of defendant in representing the witness' son in a criminal prosecution. The cancelled check bears defendant's endorsement and no claim is made that it was deposited in defendant's bank account. See Tr. 638-642 and Gov't. Ex. 101.

Several character witnesses testified for the defense. Several lawyers related their professional relationships with the defendant. Three former secretaries testified as to the routine and procedures in defendant's office. All said that they were paid in cash. (Tr. 1586, 1611, and 1668). Former secretary Hanson said that defendant did not have a filing system; that his bookkeeping system was almost as bad as his filing system; that he kept no accounts receivable; and that he did not keep a set of books. (Tr. 1619-1620). An elevator operator in the building where defendant had an office testified to his work habits and generosity with children. An accountant, testifying as an expert, presented a summary of the trial evidence. The summary was not received in evidence but accepted for the record as an offer of proof. The defendant did not testify.

On this appeal, defendant makes no attack on the court's instructions to the jury.

Defendant argues that the evidence is insufficient to sustain the jury verdicts. Counts I and III charge violations of 26 U.S.C. §7206(1). "The gist of the offense is a false statement, willfully made, of a material matter." United States v. Brown, 10 Cir., 446 F.2d 1119, 1122. Counts II and IV charge violations of 26 U.S.C. §7201. Its elements are willfulness, existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax. Sansone v. United States, 380 U.S. 343, 351; and United States v. Swallow, 10 Cir., 511 F.2d 514, 519. Defendant signed the returns which declared that they were made under the penalties of perjury. The government evidence showed

that the returns were false in a material matter, the income was understated, and a substantial tax deficiency resulted.

Defendant claims that his actions were not willful. His former secretary, Arvilla Richardson, testified for the government that defendant kept a receipt book showing cash received. Tr. 1390-1391. Defendant did not provide to the firm of Dunlap and Fitzgerald, which prepared his returns, any cash receipt books. Tr. 305. The tax preparers had no knowledge of the checks which defendant cashed rather than deposited. Tr. 309-310. Defendant's reliance on the advice of his lawyer and accountant does not negate willfulness unless defendant made a complete disclosure of all pertinent facts. United States v. Jett, 6 Cir., 352 F.2d 179, 182, and United States v. Baldwin, 2 Cir., 307 F.2d 577, 579. Defendant concealed, rather than disclosed, his cash receipts. Bank Teller Herrin said that at a minimum of once a week during 1971 and 1972, defendant cashed, without depositing in his account, checks totalling $500 to $1000 for each transaction. Tr. 1367. Teller Rogers gave similar testimony and said that the cash was given to defendant in $50 and $100 bills. Tr. 1384-1385. Bank Teller Strawn testified that during the same period she cashed checks amounting to $500 to $1,500 three or four times a month and paid defendant in $50 bills. Tr. 1386-1387. Witness Herrin identified from bank records the checks which were cashed rather than deposited. Tr. 1368-1376.

Government witness Richardson, secretary for defendant, reported to defendant that IRS had made contact with her. She identified as Gov't. Ex. 164 a written July 29, 1974, message to her from defendant. Tr. 1410-1411. Among other things the letter said:

> "Do not even mention the Criminal work. Also, you might tell them, if you tell them anything, that I did all of my own banking and saw practically all of my clients at night and that so far as you know I did not take in very much cash money."

In answer to a question of what portion of defendant's practice was in criminal cases, Richardson said, Tr. 1411, "probably the majority of it."

Willfulness to defeat or evade federal income taxes may be inferred from "concealment of assets or covering up sources of information, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal." Spies v. United States, 317 U.S. 492, 499. Substantial evidence establishes that the false statements were made wilfully and that the attempt to evade was willful.

We do not weigh the evidence or determine the credibility of witnesses. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80. See also United States v. Downen, 10 Cir., 496 F.2d 314, 319. It is enough to say that the evidence supports and justifies the verdicts of the jury.

Defendant contends that prosecution under Counts I and II is barred by the six-year period of limitations provided in 26 U.S.C. §6531 (2) and (5). Each of the questioned counts is based on an amended return filed with IRS on February 14, 1973. Gov't. Ex. 5. The indictment was returned on January 4, 1979.

The question is whether the limitation period runs from the date of the filing of the original return, September 15, 1972, or the filing of the amended return on February 14, 1973. Defendant argues that the original return governs because the amended return merely revised a depreciation schedule.

Section 7206 (1) applies to "any return, statement, or other document" not believed "to be true and correct as to every material matter." Section 7201 applies to a person who attempts to defeat or evade a tax "in any manner." In holding that the statute was no bar, the district court cited United States v. Habig, 390 U.S. 222. That decision holds

that the §6531 limitation period runs from the date of the actual filing and not from the original due date of the return. In the instant case the original due date had been extended and the original return filed within the extension period.

IRS filed the amended return and recognized the increased depreciation claim. Norwitt v. United States, 9 Cir., 195 F.2d 127, 134, and Levy v. United States, 3 Cir., 271 Fed. 942, 943, hold that a person may be prosecuted for filing an amended return. We agree. An amended return is "any return, or other document" within the purview of §7206 (1) and may constitute an attempt to defeat or evade a tax "in any manner" within the proscription of §7201. Accordingly, the statute is no bar. In the circumstances we have no reason to consider the government's alternative argument that the concurrent sentence doctrine should be applied.

Error is alleged in receipt in evidence of state court civil and criminal dockets of cases in which defendant was the attorney of record. The dockets showed the extent and nature of defendant's law practice during the tax years. They supplied information leading the government to the many "specific items" witnesses. They disclosed the extent of the defendant's criminal law practice and corroborated the testimony of the witness Richardson in that regard. They were relevant evidence as that term is defined in Rule 401, Federal Rules of Evidence. Defendant argues that the introduction of the dockets was an effort by the governement to force him to testify. In his opening statement to the jury defense counsel said that the defendant would testify and outlined the scope of his expected testimony in some detail. Tr. 1501-1505. Later, defendant elected not to testify. Tr. 1690. Although evidence tended to implicate the defendant in the commission of the offense charged, "[t]he mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination." Barnes v. United States, 412 U.S. 837, 847.

The last defense witness was an accountant who qualified as an expert. He prepared, and the defense offered as their

Exhibit 513, a summary purporting to show that certain items should be deleted from the government's showing of gross receipts. The reasons given for item rejection was witness credibility because of felony convictions and lack of documentation. The court excluded the exhibit and its related testimony on the ground that credibility was for determination by the jury, not by a defense witness. Exhibit 513 was received as a defense offer of proof.

Ordinarily the admission of expert testimony is within the discretion of the court, Wolford v. United States, 10 Cir., 401 F.2d 331, 332, and its rulings will be disturbed only for clear abuse of discretion, United States v. Carranco, 10 Cir., 551 F.2d 1197, 1199-1200.

The defense expert did more than summarize the evidence. He gave reasons why specific items should be excluded. The "specific items" witnesses were subject to defense cross-examination. An expert "may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility." United States v. Ward, 3 Cir., 169 F.2d 460, 462; see also United States v. Brown, 10 Cir., 540 F.2d 1048, 1054, cert. denied, 429 U.S. 1100. The offer of proof was properly rejected.

Defendant claims that he was a target defendant because IRS was emphasizing the prosecution of lawyers and accountants. He directs attention to various news items. We considered a claim of selective prosecution in United States v. Rickman, 10 Cir., _____F.2d_____, and nothing more need be added. Defendant showed none of the elements needed to establish unconstitutional selectivity. See Barton v. Malley, 10 Cir., 626 F.2d 151, 155.

The defense claims of judicial and prosecutorial misconduct border on frivolity and merit no discussion. The experienced trial judge presided over this difficult trial with patience and impartiality. The defendant must suffer the consequences of his own actions.

Affirmed.

APPENDIX B

MARCH TERM — MARCH 31, 1981

No. 79-1989

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CARROLL SAMARA, *Defendant-Appellant.*

Before HONORABLE OLIVER SETH, *Chief Judge,* HONORABLE JEAN S. BREITENSTEIN and HONORABLE STEPHANIE K. SEYMOUR, *Circuit Judges.*

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Criminal Action
No. 79-15

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CARROLL SAMARA, *Defendant.*

Transcript Of Proceedings Had
January 29, 1979
Excerpts From Pages 80-81

APPEARANCES:

HON. WESLEY E. BROWN, *Judge, Assigned, Presiding.*

WILLIAM S. PRICE,	Asst. U.S. Attorney Western District of Oklahoma Oklahoma City, Okla. 73102 *Appearing for Plaintiff.*
BERRY & BERRY, By JAMES W. (Bill) BERRY And JAMES W. BERRY	Attorneys at Law Suite 623-626 Cravens Bldg. Oklahoma City, Okla. 73102
And JOHN C. MORAN,	5400-A N. Independence Oklahoma City, Okla. 73112 *Appearing for Defendant*

* * *

The defendant moves for an order dismissing Counts I and II on the basis that these Counts, as they relate to his income tax returns for 1971 are barred by the statute of limitations. The applicable statute of limitations is found in 26 U.S.C. 6531. I may have these reversed, 6531 and 6513. Any way, the statute provides that if a return is filed before the last day prescribed for filing, the return is considered filed on such last day, and that the last day prescribed for filing shall be determined without regard to any extension of time granted the taxpayer.

The defendant argues that he had an automatic extension and two additional extensions of time in which to file his 1971 return, and that under the statute these should not be considered in determining the date that the six year statute of limitations began to run. He argues that this result is partly dictated by the alleged fact that Form 1040X, an amended return, is not prescribed by statute. He argues that, therefore, the six year statute of limitations would have run on September 15, 1978.

The argument is in contravention of guidelines set down by the Supreme Court in the case of United States versus Habig. That is a 1968 case, 19 Law Ed. 2nd 1055, 390 U.S. 222, and his motion I don't think should be sustained. So the motion to dismiss on Counts I and II will be denied.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Criminal Action
No. CR-79-15-B

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CARROLL SAMARA, *Defendant.*

Memorandum And Order

(Filed April 16, 1979)

The matter is before the Court on defendant's motion that the Court reconsider its previous ruling of January 29, 1979 overruling defendant's motion to dismiss the Indictment for the year 1971 on the basis that the statute of limitations had expired. In the hearing held on January 29, 1979, this Court ruled that the statute of limitations as to Counts I and II of the Indictment, relating to 1971, began to run on the date that defendant filed an amended return for that year, February 14, 1973. We held that therefore the six-year statute of limitations expired on February 14, 1979, and that an Indictment filed on January 4, 1979 was within the statute.

Defendant argues that the filing of an amendment does not extend the statute of limitations, and that the statute should commence on the date that the original return was filed pursuant to lawful extensions, September 15, 1972. The statute would expire on September 14, 1978, and the Indictment was not timely, under this theory. Defendant argues that

the Court erred in relying on *United States* v. *Habig*, 390 U.S. 222, 19 L.Ed.2d 1055, 88 S.Ct. 926 (1968), and cites cases and Mertens Law of Federal Income Taxation in support of his proposition.

The government urges that the Court was correct in its ruling. The government states that the statute commences on the date that any unlawful return was filed, that *Habig* is applicable, and that it is irrelevant that it was an amended return that was filed rather than a return filed pursuant to an extension.

For reasons stated herein, we affirm our previous ruling.

The Court has examined cases cited to us and the summary of the law contained in Mertens. It appears to the Court that defendant confuses two different statutes of limitations, that applicable to criminal prosecutions, 26 U.S.C. §6531, and that applicable to assessments and collections, 26 U.S.C. §6501. Defendant's citations are applicable to the latter, but do not govern the statute of limitations of criminal prosecutions.

Defendant cites the Court to 10 Mertens Law of Federal Income Taxation Chapter 57, Statute of Limitations on Assessment and Collection, §57.15, Amended Returns:

> When the return required by law has been filed and thereafter an amended return is filed, the statute of limitations begins to run from the date the original return was filed, and the filing of the amended return does not operate to extend the statute. The first return, however, must be complete and meet the statutory requirements; the statute of limitations will begin only upon the filing of a proper return. The running of the statute of limitations cannot in any way be affected or suspended by the later filing of amended returns. It is not always easy to determine whether the problem involves a "tentative," "defective," "amended" or "original" return. Care must be exercised to prevent the facts from being confused by the terminology used.

A number of cases support this proposition. These cases arose under 26 U.S.C. §6501 or one of its predecessors, including §275 of the Internal Revenue Code of 1939. §6501, Limitations on Assessment and Collection, (a) General rule, provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed. . . ." Accordingly, it was held in *Goldring* v. *Commissioner,* 20 T.C. at 81, that "[t]here is no statutory provision for an amended return, and the acceptance or rejection thereof is solely within the discretion of the Commissioner." The Court held that:

> The petitioners cannot avoid assessment of such taxes [taxes due] by partially correcting their returns after the date of filing so as to bring themselves out from under the terms of section 275(c).
>
> We hold that the 5-year limitation provided by section 275(c) started to run upon the filing of the original returns and was not tolled by the filing of the amended returns. 20 T.C. at 83.

Goldring was followed in the Tax Court's Memorandum Decision *Sam E. Broadhead,* T.C. Memo 1955-328, *aff'd* 254 F.2d 169 (5th Cir. 1958), where the Court said the filing of an amended return would not cure a false and fraudulent return. Likewise, in *Dowell* v. *Commissioner,* 68 T.C. 646 (1977), the Court cited *Goldring* with approval in holding that although the taxpayers had filed amended returns, the statute of limitations for the notice of deficiency pursuant to §6501 would be determined as of the date of the original false and fraudulent returns. *See also Kaltreider Constrcution, Inc.* v. *United States,* 303 F.2d 366 (3rd Cir. 1962). The thrust of these cases is that the Commissioner is not barred from collecting a deficiency because the taxpayer has filed an amended return.

We note that it is these cases which are cited in Mertens to support the statement of the law contained in §57.15, quoted above. §57.15 is concerned with assessments and collections, 26 U.S.C. §6501, and so are the cases. §57.15 does not expressly refer to 26 U.S.C. §6531, criminal prosecutions.

The cases have nothing to do with criminal prosecutions. Mertens contains a separate chapter, Chapter 55A, which covers the statute of limitations under 26 U.S.C. §6531. Thus, it is apparent that Mertens' statement about amended returns is not applicable to the effect of an amended return on the statute of limitations under 26 U.S.C. §6531 for criminal prosecutions.

Although Chapter 55A does not discuss the effect of an amended return per se on §6531's statute of limitations, it has a general discussion of returns filed after the filing date:

> The limitation period for indictment begins to run from the day on which the offense was committed. The day following is the first day of the period. Under the 1954 Code, the periods of limitations on criminal prosecutions are to be determined in the same manner and under the same rules as in the case of a determination of the time when returns are deemed to have been filed and the taxes deemed to have been paid in civil matters involving issues as to the time of payment of taxes [26 U.S.C. §6513]. Accordingly, a number of courts have adopted the rule that returns are deemed to have been filed and willful acts or omissions are committed on the last date prescribed for the filing of returns regardless of any extensions of time granted by the Commissioner. This rule was modified by the Supreme Court, however, so that it no longer applies to cases involving limitations questions under Section 6531 where the returns in question were filed after the original statutory due date without regard to extensions of time.
>
> In the case before the Supreme Court [*United States* v. *Habig, supra*] prosecution would have been barred by the six year statute of limitations provision of Section 6531 if the limitation period had started to run on the original due date without regard to an extension period, but not if the filing date, within the extension period, were the starting date. The Court held that since the offenses charged were committed at the time the returns were fil-

ed, the limitations period started to run on that date and prosecution was not barred. The Court reasoned that to hold otherwise would result in the limitations period starting to run before the commission of the underlying criminal acts. It also concluded that the third sentence of Section 6513(a), incorporated by reference into Section 6531, which provides that returns are deemed to be filed on the last day prescribed for filing without regard to extensions of time, applies only to cases where payment is made or a return is filed prior to the statutory due date without regard to extensions.

10 Mertens Law of Federal Income Taxation §55A.15, Period of Limitations on Criminal Prosecutions at 76.

26 U.S.C. §6531 provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found . . . within 3 years next after commission of the offense, except that the period of limitation shall be 6 years ——
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> * * *
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

Defendant is charged with offenses falling into paragraphs (2) and (5), so a six-year period applies.

We have not been cited to, nor does our research disclose, any case which deals with the statute of limitations under §6531 vis-a'-vis an amended return. In making our ruling of January 29, 1979, which defendant challenges here, we noted that the case most nearly on point is *United States* v. *Habig, supra.* As Mertens indicated, the Supreme Court held that the six-year limitations period under 26 U.S.C. §6531 runs from the date of actual filing of a return pursuant to an

extension of time, and not from the original due date of the return; and that therefore where the indictment was filed within six years of the date of actual filing of the returns pursuant to the extension of time, the prosecution was not barred. The Court emphasized that §6531 is concerned with the date the offense is committed.

The alleged offense charged in Counts I and II was committed on the date that the amended return was filed. Defendant argues that the amended return did not change any substantive declaration in the original return, but merely revised a depreciation schedule. Defendant appears to be thus saying that the offense, if any, was committed when the original return was filed. However, the Court feels that the refiling of the challenged declarations is sufficient to constitute an offense, if proved. The situation here is more like *Habig*, with the offense being committed when the challenged return was filed, than like *Goldring*, with the taxpayer arguing that the filing of an amendment tolled the statute of limitations. In fact, if the Court adopted defendant's argument, we would in effect be ignoring *Goldring*, for we would be permitting an amended return to replace the original return in calculating deficiencies. We do not say that an amended return may extend the period of limitations for the original return. We say that the alleged offense with which defendant is charged in Counts I and II occurred on the date the amended return was filed, February 14, 1973, and that prosecution is not barred.

In accordance with the views expressed herein,

IT IS ORDERED that Defendant's Motion to Modify is Overruled.

At Wichita, Kansas this 11th day of April, 1979.

United States District Judge
Assigned

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1408

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CARROLL SAMARA, *Defendant-Appellant.*

Appeal From The United States District Court For The Western District Of Oklahoma

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(CR.-79-15)

(Filed August 16, 1979)

John C. Moran, Attorney, James W. Bill Berry, Berry & Berry, filed memorandum opposing summary affirmance on behalf of appellant.

Larry D. Patton, United States Attorney, William S. Price, Assistant United States Attorney, filed brief on behalf of appellee.

Before SETH, *Chief Judge,* PICKETT and MCWILLIAMS, *Circuit Judges.*

Slip Opinion

PER CURIAM

Appellant Samara was charged by grand jury indictment with four counts of violating the federal income tax laws. On January 19, 1979, he filed a motion to dismiss Counts 1 and 2

of the indictment, both of which involve amended returns, on the ground that prosecution thereunder is barred by the applicable statute of limitations. The district court denied the motion on January 29, and denied a motion for reconsideration of the statute of limitations questions on April 16. Samara then instituted the instant appeal which we dismiss as being from a non-final, interlocutory order.

In bringing this appeal Samara places primary reliance on *Abney* v. *United States,* 431 U.S. 651 (1977), wherein the Supreme Court held to be immediately appealable an appeal from rejection of a double jeopardy claim. The Supreme Court has also just held to be immediately appealable the appeal of a member of Congress, facing criminal charges, who sought dismissal of an indictment based on alleged violations of the Speech or Debate Clause of the United States Constitution. *United States* v. *Helstoski,* 99 S.Ct. 2432 (1979).

Here, Samara argues that a statute of limitations bar to prosecution is identical in nature to the double jeopardy bar and that *Abney* rationale is thus applicable here. We disagree.[1] Both *Abney* and *Helstoski* involved specific constitutionally mandated rights, each of which precluded "exposure" of the protected individual to criminal prosecution. Statutes of limitation derive from statutes and constitute affirmative defenses. The running of a statute of limitations ". . . might eventually bar prosecution, but only if the government could not prove any applicable exception." *United States* v. *Wild,* 551 F.2d 418, 422 (D.C. Cir. 1977), *cert. denied,* 431 U.S. 916. Defenses based upon statutes of limitations are a proper subject for review on direct appeal.

---

[1] The Third Circuit, in *United States* v. *Cerilli,* 558 F.2d 697, 700 (3rd Cir. 1977), *cert. denied,* 434 U.S. 860, was faced with an interlocutory appeal involving both a double jeopardy question and a statute of limitations question. In construing *Abney,* the court concluded that, even though the double jeopardy question was immediately appealable, the statute of limitations question did not fall within the ambit of the doctrine regarding collateral orders.

See, e.g., United States v. *D'Andrea,* 585 F.2d 1351, 1355 n.3 (7th Cir. 1978); *United States* v. *Fruehauf Corp.,* 577 F.2d 1038, 1069 (6th Cir. 1978), *cert. denied,* 99 S.Ct. 349.

Appeal dismissed. The mandate shall issue forthwith.

APPENDIX F

26 U.S.C. §6501. Limitations On Assessment And Collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * *

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * *

26 U.S.C. §6511. Limitations On Credit Or Refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

* * *

26 U.S.C. §6513. Time Return Deemed Filed And Tax Considered Paid

(a) Early return or advance payment of tax

For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

* * *

26 U.S.C. §6531. Periods Of Limitation On Criminal Prosecution

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —

* * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * *

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

* * *

26 U.S.C. §7201. Attempt To Evade Or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. §7206. Fraud and False Statements

Any person who —

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 58 CR 475

UNITED STATES OF AMERICA, *Plaintiff,*

v.

ALBERT M. BRIDELL, *Defendant.*

(Filed December 29, 1959)

Transcript of proceedings had at the hearing of the above-entitled cause, before the HON. WILLIAM J. CAMPBELL, one of the Judges of said Court, in his courtroom, U. S. Courthouse, Chicago, Illinois, on Thursday, November 20, 1958, at 10:00 o'clock, a.m.

PRESENT:

MR. A. F. MANION
Assistant U. S. Attorney,
On behalf of the
Government;

MR. GEORGE D. CROWLEY
On behalf of the
Defendant

THE CLERK: No. 58 CR 475, *United States* vs. *Albert M. Bridell,* motion to dismiss.

THE COURT: Any other matters?

THE CLERK: No.

THE COURT: Anything further that was not in your briefs?

MR. CROWLEY: No, your Honor.

THE COURT: Just be seated.

On March 14, 1952, Albert M. Bridell, defendant herein, together with his wife, Emlee B. Bridell, filed a joint income tax return for the calendar year 1951 in which he stated that his salaries, wages and taxable compensation received during the calendar year 1951 from the American Carbon Paper Corporation amounted to $6,008. On June 13, 1952, the defendant, as President of the American Carbon Paper Corporation, caused to be filed with the Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, a corporate income tax return on behalf of such corporation for the calendar year 1951, in which return it was stated that the total income, exclusive of reimbursed expenses, received by the defendant and his wife from such corporation during the year 1951 amounted to $6,008.

On June 13, 1958, a complaint was filed with the United States Commissioner. On July 31, 1958, the May 1958 Federal Grand Jury returned a two count indictment against Albert M. Bridell. Count I of the indictment states in substance that:

> ". . . Albert M. Bridell . . . who had on March 14, 1952 filed . . . a joint income tax return on behalf of himself and his wife . . . did willfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him and his wife to the United States of America for said calendar year 1951 by filing and causing to be filed for the purpose of concealing additional unreported income received by the said Albert M. Bridell and his wife Emlee B. Bridell, during said calendar year 1951, a false corporation income tax return on behalf of the American Carbon Paper Corporation for said calendar year 1951 . . . in violation of Section 145(b), Internal Revenue

Code of 1939, 26 U.S.C., Section 145(b)." So much for the charge in the first count of the indictment.

Defendant has made a motion to dismiss this count of the indictment. Count II is not in question. We have only Count I before the Court.

Defendant has made a motion to dismiss this Count I of the indictment on the grounds that it was not found within six years next after the alleged offenses were committed; or that it is duplicitous.

As to the first ground put forth by the defendant which I think is the only ground worthy of consideration. [sic]. I do not find it duplicitous. As to the first ground put forth by the defendant in support of his motion to dismiss, the basic limitation statute, Tile [sic] 26 U.S.C., Sec 3748 provides for a six year period of limitation in regard to the prosecution for offenses of this nature. It is not questioned that the complaint having been instituted on June 13, 1958 operated to toll the statute of limitations until the discharge of the grand jury at its next session. However, it is the contention of the defendant that the offense charged in the indictment was completed on March 14, 1952, by the filing of a fraudulent income tax return and that, therefore, the complaint instituted before the Commissioner on June 13, 1958, was not within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 was not timely.

It is the contention of the Government that the offense charged is separate from the filing of the fraudulent income tax return, namely, the attempt to evade and defeat the taxes owing by the defendent by the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing additional unreported income of the defendant. Since this act occurred on June 13, 1952, the complaint instituted on June 13, 1958 would be within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 would be timely.

A plain reading of the indictment clearly shows that the crime charged in Count I of the indictment is the attempt to evade and defeat the taxes owing by the defendant through the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing unreported income of the defendant.

Since this act took place on June 13, 1952, the question presented is whether this act is an offense separate from the filing of the fraudulent income tax return on March 14, 1952 under Title 26 U.S.C.

Sec. 145 (b) which in so far as material here provides:

> "Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall . . . be guilty of a felony . . ."

Defendant contends that the corporate return on June 13, 1952 was not a separate offense under Sec. 145 (b) but was part and parcel of any offense which may have been committed by the defendant upon the filing of his individual tax return on March 14, 1952. In support of this contention, defendant cites *U.S.* v. *Johnson,* 319 U.S. 503, 515; *Inholte* v. *U.S.*, 226 F. 2d, 585; *Cave* v. *U.S.*, 159 F. 2d 464; *Guzik* v. *U.S.*, 54 F. 2d 618.

The Government contends that the filing of the corporate return was a separate offense under Sec. 145 (b) and cites *U.S.* v. *Beacon Brass Inc.*, 344 U.S. 43 and *U.S.* v. *Sclafani,* 126 F. Supp. 654. The *Beacon* case involved an indictment returned against Beacon Brass Co. and its president on September 14, 1951, charging that both the defendants had attempted to evade taxes owing by making fraudulent statements to Treasury representatives on October 24, 1945, "for the purpose of concealing additional unreported income in violation of Section 145 (b)."

The unreported income apparently should have been included in the corporate return which was filed in January 1945, though no reference was made to such in the indictment.

The District Court dismissed the indictment on the grounds that it failed to charge an offense under Title 26 U.S.C. Section 145 (b) because such making of false statements could be punished only by Sec. 35 (a) of the Criminal Code, since that section dealt specifically with false statements and the three year limitation of that statute had expired as to statements made in October, 1945. The Supreme Court in reversing the District Court made some statements which to me appear confusing. At Page 45, the Court states:

> "The purpose to evade taxes is crucial under this section. The language of Sec. 145 (b) which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income."

Then at Pages 46 and 47, in the same opinion, the same Court states:

> "The appellees contend that the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed. On the basis of this contention, appellees seek to sustain the decision below on the grounds that the six-year statute of limitations had run, and that the dismissal of the first indictment is *res djudicata* [sic] and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to review of the District Court's construction of the statute in the light of the facts alleged in the indictment."

Then they cite *United States* v. *Borden Co.*, 308 U.S. 188.

Thus, the Supreme Court is stating on the one hand that false statements to Treasury Agents are offenses, under Sec. 145 (b) and then stating that they are not deciding whether or not such statements are part and parcel of the one crime of tax evasion which was complete when the allegedly false tax return was filed.

In the *Sclafani* case, Counts 4 and 5 of information [sic] charged that on or about and between June 21, 1950, and on January 12, 1951, the defendant, a married man, willfully and knowingly attempted to defeat and evade part of the income taxes due from him and his wife for the years 1945 and 1946, respectively, by making, filing and causing to be filed with representatives of the United States Treasury Department certain false and fraudulent statements for the purpose of concealing additional unreported income. The returns for the years in question were filed in March 1946 and March 1947, respectively, more than six years prior to the filing of the information, the limitation fixed by Title 26 U.S.C. Sec. 3748 (a), subdivision 2.

The Court denied the defendant's motion to dismiss stating at page 656:

> "In support of his motion the defendant cites the cases of *Guzik* v. *United States,* 54 F. 2d, 618, *Cave* v. *United States,* 159 F. 2d 464, and *United States* v. *Ehrlich,* 104 F. Supp. 223, contending that those cases are controlling since the crimes in said counts alleged were completed in March, 1946, and March, 1947. It is correct to say that prosecution for the alleged crime of attempted evasion of taxes *by the filing of false tax returns* was outlawed in 1954, but it was possible for the defendant to violate the statute involved in more than one way and on more than one occasion, and that is precisely what the Government accuses the defendant of doing. Counts 4 and 5 of the instant information charge that the defendant attempted to evade the payment of income taxes for the years 1945 and 1946, respectively, by filing or causing to be filed with representatives of the United States Treasury Department between June 21, 1950 and January 12, 1951, certain false and fraudulent statements for the purpose of concealing additional unreported net income for the years therein mentioned. The case of *United States* v. *Beacon Brass Co., Inc.*, 344 U.S. 43 appears to be in point. The pertinent facts in that case are substantially similar to those in the instant case . . ."

Therefore, the *Beacon* case and *Sclafani* case relied upon by the Government here do not decide whether or not the defendant's act is, in the case at bar, a part and parcel of the offense of March 14, 1952 which was the filing of a fraudulent income tax return since the *Beacon* case expressly states that it is not deciding that question and the *Sclafani* case relies on the *Beacon* case as deciding that in a case of this nature two separate offenses are possible.

In my opinion the answer to this problem lies in the analysis of Sec. 145 (b), the section alleged to have been violated.

In *Spies* vs. *United States*, 317 U.S. 492, the Supreme Court in discussing the difference between Sec. 145 (a) and Sect. 145 (b) made the following statement at pages 498, 499:

> "The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading the tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest offenses against the revenues, Congress intended some willful commission in addition to the willful additions that make up the list of misdemeanors. *Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*"

It is clear to me from this language, and it has been held by many cases in addition to those cited by defendant, that it is the *same act* which is aggravated to the degree of a felony by such conduct which amounts to a "willful and positive attempt to evade tax in any manner."

I cite *U.S.* vs. *Hoover*, 233 F. 2d 870; *Elwert* v. *U.S.*, 231 F. 2d 928; *Hayes* v. *U.S.*, 227 F. 2d 540; *Canton* v. *U.S.*, 226 F. 2d 313; *U.S.* v. *Barden*, 224 F. 2d 255; *U.S.* v. *Smith*, 206 F. 2d, 905.

The act which constitutes the offense in the case at bar was the filing by the defendant of a joint income tax return on March 14, 1952 which was aggravated by the subsequent filing by the defendant as a corporate officer of a corporate income tax return on June 13, 1952.

Therefore, the act of the defendant in filing a corporate return on June 13, 1952 is not an offense separate from the offense completed on March 14, 1952 by the filing of his fraudulent income tax return. Therefore, Count I of the indictment, which charges the defendant with a violation of Sec. 145 (b) with reference to his own personal income tax return by such an act must fail.

It is illogical to presume that the true nature of the offense as set out in 145 (b) is contained in the defendant's act of filing a fraudulent corporate return since the evasion, per se, took place when the defendant filed his personal return. Such a construction as urged here by the Government would enable the Government to continue the statute of limitations indefinitely by using any false statement in regard to a past tax evasion as a reviving of the statute of limitations.

The motion to dismiss Count I of the indictment is for the reasons stated granted. And the same is dismissed.

Have we set a trial date as to the case?

MR. CROWLEY: Yes.

THE COURT: Has there been a plea as to Count II?

MR. CROWLEY: No, there has not.

THE COURT: Is the defendant present?

MR. CROWLEY: The defendant is present.

THE COURT: Proceed with the arraignment as to Count II.

MR. CROWLEY: The defendant has already been arraigned.

MR. MANION: He has been arraigned and entered a plea of not guilty.

MR. CROWLEY: A plea of not guilty.

THE COURT: Then he has been arraigned?

MR. CROWLEY: He has been arraigned.

THE COURT: A please of not guilty as to Count II.

When will you be ready for trial?

MR. MANION: The Government can be ready for trial at the availability of our witnesses.

THE COURT: About how long is that? Is this an old case?

MR. MANION: No, it is not, your Honor. The indictment was returned last July.

THE COURT: All right.

MR. MANION: Depending —

THE COURT: Do you want it in January?

MR. MANION: I would say January would be satisfactory.

THE COURT: Is that satisfactory?

MR. CROWLEY: Very satisfactory with us, your Honor.

THE COURT: We just set a matter for the first week in January. Suppose we give you Monday, January 12th?

MR. CROWLEY: Monday, January 12th?

THE COURT: Does that sound all right?

MR. CROWLEY: Yes.

THE COURT: Very well.

Anything further?

MR. CROWLEY: Your Honor, may we have a copy of the opinion?

THE COURT: Yes, the reporter will have it. You can get it from him.

MR. CROWLEY: Yes, thank you.

(Which were all of the proceedings had at the hearing of the above-entitled case.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 58 CR 475

UNITED STATES OF AMERICA, *Plaintiff,*

v.

ALBERT M. BRIDELL, *Defendant.*

CERTIFICATE

I hereby certify that the above and foregoing transcript, Pages Nos. 1 to 16, inclusive, is a true and accurate transcript of the original shorthand notes taken upon the hearing in the above-entitled cause, on Thursday, November 20, 1958.

/s/ PAUL A. RUHE
Official Court Reporter,
United States District Court.

Dated: November 20, 1958.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-2014

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL SAMARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2014

CARROLL SAMARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this criminal tax case is whether the court of appeals correctly held that the prosecution for attempted tax evasion and filing a false tax return was timely because the six-year statute of limitations under Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C.) began to run from the time petitioner filed his amended 1971 income tax return upon which he was indicted and convicted, rather than from the time he filed his original 1971 tax return.

The pertinent facts may be summarized as follows: Petitioner originally filed his 1971 tax return on September 15, 1972 (Pet. App. 13a), after having received an automatic extension and two additional extensions of time within which to file his return (Pet. App. 12a). Thereafter, petitioner filed an amended return for 1971 on February 14, 1973 (Pet. App. 13a). The only change petitioner made on this amended return was the revision of a depreciation schedule (Pet. App. 18a). The Internal Revenue Service filed the amended return and recognized the increased depreciation claim (Pet. App. 6a).

On January 4, 1979, an indictment was returned against petitioner in the United States District Court for the Western District of Oklahoma (Pet. App. 5a). Count I of the indictment charged petitioner with filing a tax return for 1971 on February 14, 1973, that understated the gross income from his law practice, in violation of 26 U.S.C. 7206(1). Count II of the indictment charged petitioner with willfully attempting to evade his tax liability for 1971 by filing on February 14, 1973, a 1971 tax return that understated the gross income from petitioner's law practice, in violation of 26 U.S.C. 7201. Counts III and IV of the indictment charged identical violations for the year 1972 (Pet. App. 1a, 5a).

Prior to trial, petitioner moved to dismiss the first two counts of the indictment on the ground that the six-year statute of limitations of 26 U.S.C. 6531 began to run when he filed the first return for 1971 on September 15, 1972, so that the statute of limitations had expired prior to the return of the indictment on January 4, 1979. The district court denied petitioner's motion on January 29, 1979. Subsequently, in a memorandum opinion and order filed on April 16, 1979 (Pet. App. 13a-18a), the district

court denied petitioner's motion for reconsideration. The court of appeals dismissed petitioner's pretrial appeal on the ground that it was from a non-final, interlocutory order (Pet. App. 19a-21a). After a jury trial, petitioner was convicted on all four counts. The district court sentenced petitioner to concurrent three-year prison terms upon each count and imposed fines totalling $15,000 (Pet. App. 1a). The court of appeals affirmed (Pet. App. 1a-7a).

ARGUMENT

1. The decision below correctly held that petitioner's prosecution was not barred by the statute of limitations.[1] Sections 6531(2) and 6531(5) of the Internal Revenue Code provide that prosecutions for willful attempted tax evasion (26 U.S.C. 7201) and filing false tax returns (26 U.S.C. 7206(1)) must be instituted within six years after the com-

[1] Petitioner was sentenced to concurrent three-year terms of imprisonment upon each of the four counts of which he was convicted. In addition, he was given concurrent fines of $5,000 upon the first and third counts and concurrent fines of $10,000 upon the second and fourth counts. Here, petitioner challenges only his convictions upon the first two counts of the indictment. Since the sentences imposed upon those counts, however, are concurrent with the sentences imposed upon the third and fourth counts, and petitioner does not challenge his convictions upon the third and fourth counts, this Court could decline to review petitioner's conviction under the concurrent sentence doctrine without reaching the merits. See *Benton* v. *Maryland*, 395 U.S. 784, 791-793 (1969); *United States* v. *Tager*, 479 F.2d 120, 123-124 (10th Cir. 1973), cert. denied, 414 U.S. 1162 (1974). We note that because the court of appeals in this case found that the indictment was timely, it had "no reason to consider the government's alternative argument that the concurrent sentence doctrine should be applied" (Pet. App. 6a).

mission of the offenses. Where the charge relates to the filing of a tax return, the statutory period begins to run on the date of the filing. *United States* v. *Habig*, 390 U.S. 222, 223 (1968).

Petitioner contends that his prosecution under the first two counts of the indictment was barred by the six-year statute of limitations because the statutory period began to run on September 15, 1972, when he filed his first return for the 1971 tax year. He asserts (Pet. 5, 8-9, 11) that the subsequent filing of the amended tax return for 1971 on February 14, 1973, had no effect upon the running of the limitations period because the false statements in the amended return that were the basis of the charges against petitioner appeared in the first return filed for 1971 and were merely repeated in the amended return (*i.e.*, that the amended return contained no new false statements material to the charges in the indictment).

Petitioner's contention, however, is contrary to the plain language of the statutes under which he was prosecuted. Section 7201 of the Code broadly prohibits willful attempts to defeat or evade a tax "in any manner." Section 7206(1) proscribes the false filing of "any return, * * * or other document." As the court of appeals correctly recognized (Pet. App. 6a), "[a]n amended return is 'any return, or other document' within the purview of § 7206(1) and may constitute an attempt to defeat or evade a tax 'in any manner' within the proscription of § 7201." Hence, despite the fact that petitioner's filing of the original tax return for the 1971 year could have served as the basis for charges under Sections 7201 and 7206(1), his filing of the false amended return was a separate violation of Section 7206(1) and Section 7201, when done as an attempt to evade

tax. *Norwitt* v. *United States*, 195 F.2d 127, 133-134 (9th Cir.), cert. denied, 344 U.S. 817 (1952); *Levy* v. *United States*, 271 F. 942, 943 (3d Cir. 1921). Since the statute of limitations began to run on the date of the offense (*i.e.*, when the false amended return was filed), the indictment was timely.

The fact that the amended return contained no new false statements relevant to the charges beyond those in the original return is immaterial. Under the criminal tax statutes, prosecution is not restricted solely to the first act of evasion or to the first false and fraudulent return filed for a particular year. The amended return contained false statements as to the gross income from petitioner's law practice. The fact that petitioner made the same false statements in an earlier return for the same year does not mean that he did not commit a separate offense, as to which the statute of limitations also applied, when the amended return was filed with the Service.[2]

The issue presented by the petition is one that arises infrequently, has generated no conflict among the circuits, and does not in this case affect petitioner's punishment. It does not warrant review by this Court.

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[2] See *United States* v. *Smith*, 13 F.2d 923, 924 (W.D. La. 1926), which discusses *Levy* in the following terms:

> I take it that any act which the taxpayer might do, either under the express requirements of the statute, such as the making of a fraudulent original return, or the filing of subsequent fraudulent proofs, affidavits, etc., whether they be in the nature of an amended return or what not, where the effect and reasonable purpose would be to evade or defeat the tax, would constitute the offense.

2. Petitioner further contends (Pet. 2) that the decision below "conflicts in principle with this Court's recent decisions sustaining the important policy of repose on which criminal statutes of limitations are based * * * and conflicts with this Court's rulings respecting the effect of amended tax returns on the parallel statute of limitations applicable to *civil* tax cases" (emphasis in original). This argument, however, has no application to this case. Here, there has been no extension, tolling, or other enlargement of the six-year statute of limitations under Section 6531; the statute of limitations began to run with the filing of the amended return for which petitioner was indicted. Consequently, the prosecution for Counts I and II of the indictment was in no manner a prosecution of stale criminal charges. See *United States* v. *Marion*, 404 U.S. 307, 332 (1971).[3]

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[3] None of the civil tax cases petitioner cites (Pet. 8) conflicts with the decision below. Although the Court held in *Zellerbach Co.* v. *Helvering*, 293 U.S. 172 (1934), and *National Paper Co.* v. *Helvering*, 293 U.S. 183 (1934), that Congress intended that the civil limitations period should run from the filing of the original return, it was careful to limit its holding to those situations where the original return evinced "an honest and genuine endeavor to satisfy the law" (293 U.S. at 180). *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933), is likewise distinguishable as it did not deal with the filing of tax returns but with an amended claim for refund. Nor does *Florsheim Bros Co.* v. *United States*, 280 U.S. 453 (1930), bear upon this case. It simply held that a "tentative return" could not start the running of the limitations period.

At all events, reliance upon cases applying the statute of limitations upon the assessment of taxes in a civil case in support of an asserted conflict with a criminal case is particularly inappropriate. The civil statute of limitations (26

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

U.S.C. 6501(c)) expressly provides that there is *no* limitation upon the assessment of tax where a false return has been filed with the intent to evade tax or where there has been a willful attempt to defeat or evade tax.

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No. 80-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL SAMARA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONER'S REPLY BRIEF

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
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PETITIONER'S REPLY BRIEF

INTRODUCTION

The government's Memorandum in Opposition demonstrates that this case squarely raises, on undisputed facts, a clear-cut legal issue of considerable importance to the administration of the tax laws and of the criminal-justice system.

In our Petition we contended that the fundamental policies of repose supporting criminal statutes of limitations — as repeatedly recognized by this Court (Pet. 6-7) — require a functional common-sense approach to the question whether an amended tax return constitutes a new criminal act empowering the government to file criminal charges even after the statute of limitations has expired on the original tax return. Pet. 9-12. The government clearly admits that in this case the petitioner's return was filed for a purpose wholly irrelevant to the government's criminal case, and contained no new false representations.[1] Yet the government makes no attempt to reconcile its "separate offense" argument with the policies supporting a functional judicial approach to this issue, as set forth in our original petition and as illustrated in such cases as *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970), *United States* v. *DiSantillo*, 615 F.2d 128, 132-37 (3d Cir. 1980), and *United States* v. *Bridell*, Pet. App. G, pp. 27a, 34a. *See* Pet. 6, 10-11. The cited authorities are totally ignored in the Government's Memorandum.

ARGUMENT

1. The government's first response argues that an amended return may constitute "any return" under 26 U.S.C. §7206(1) and may amount to an act of evasion "in any manner" under §7201. It cites three cases which establish that an amended return may constitute a criminal offense under the quoted language of the Code. See Gov. Mem. 4-5 and n. 2. It is obvious that we agree, both with the government's assertion and with the three cited cases. Pet. 9 and n. 7. The issue posed in this case is *not*, however, whether the filing of an

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[1] The government acknowledges "[t]he fact that the amended return contained no new false statements relevant to the charges [for which petitioner was convicted] beyond those in the original return . . ." (Gov. Mem. 5) and that "[t]he only change petitioner made on this amended return was the revision of a depreciation schedule" (*id.* 2), which had nothing whatever to do with the criminal case against petitioner.

amended return may be a criminal offense. The dispositive question is whether it is consistent with the policies of the statute of limitations for such a return to be treated as an offense "separate" from an original return if it has been filed for a purpose irrelevant to the criminal charge. On that issue the government simply asserts the affirmative, in wholly conclusory fashion, without the benefit of reasoning or precedent.

2. Legitimate law enforcement and tax regulatory goals are fully served by the common-sense rule that only an amended return containing a new false representation is a separate criminal offense. This Court's policies regarding construction of statutes of limitations require that the limitations period run from the date of the original return if the amendment simply repeats — as the IRS's own form requires (Pet. 4 and n. 2) — the challenged information in the original return. In this case, the original return provided the IRS with all the data it needed to commence its audit.[2] If the IRS uncovers a falsehood or an attempt at evasion within six years of the filing of that return, it may initiate a timely prosecution. The amended return has absolutely no impact on the government's ability to investigate or prosecute. By treating the amended return as a "separate" offense, the government is permitted to institute an otherwise untimely prosecution.[3] The functional approach we urge, which the court below should have applied, serves to "balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed

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[2] The IRS made its decision to audit petitioner's 1971 return *prior* to the amendment. *See* Pet. 4.

[3] In this case, prior to the expiration of the criminal statute of limitations on the original return, the government sought from petitioner a written waiver of the limitations period for that return. See Pet. 3, n. 1. The government chose to indict on the amended return only after the written waiver was refused and the statute had expired. The government admits "the fact that petitioner's filing of the original tax return for the 1971 year could have served as the basis for charges under Sections 7201 and 7206(1) . . ." Gov. Mem. 4.

in the distant past." *United States* v. *DiSantillo*, 615 F.2d at 135. This approach also has "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie* v. *United States*, 397 U.S. at 115.

The government simply asserts, without benefit of explanation, that petitioner's contention based on the policies of repose "has no application to this case." Gov. Mem. 6. But in our Petition we set forth the record circumstances which demonstrate the very real prejudice suffered by petitioner because of the government's delay in commencing this prosecution. Pet. 7.

3. The government challenges our reliance on parallel decisions of this Court in civil tax cases respecting the effect of amended tax returns and other auxiliary reports on civil statutes of limitations. Pet. 8-9. The government contends that this argument is "particulary inappropriate" because the Code (26 U.S.C. 6501(c)) "expressly provides that there is *no* limitation upon the assessment of tax where a false return has been filed with the intent to evade tax or where there has been a willful attempt to defeat or evade tax." Gov. Mem. 6, n. 3 (emphasis in original).

But the Code expressly provides for strict limitations periods on *criminal* prosecutions, which this Court has repeatedly held must be carefully administered and not subject to artificial enlargement. Pet. 6-7. *See also United States* v. *Habig*, 390 U.S. 222, 227 (1968), wherein this Court, construing the criminal tax limitations provision, expressly "reiterate[d] the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose'. . . ." 390 U.S. 227, *quoting from United States* v. *Scharton*, 285 U.S. 518, 522 (1932).

It is sensible legislative policy to require strict adherence by the government to *criminal* limitations periods while authorizing unlimited *civil* fraud claims to protect the Treasury. *Cf.*, *Askins* v. *United States*, 251 F.2d 909, 912

(D.C. Cir. 1958) ("In criminal proceedings no doubt Congress also had in mind in enacting statutes of limitations for offenses not capital that punishment is but one means by which a wound to society caused by a breach of its laws may be healed, or a debt paid . . .").

Moreover, even with respect to the seemingly unambiguous language of Section 6501(c), a common-sense approach is appropriate. Thus, in *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980), the government contended that the "at any time" language of Section 6501(c) should be construed to allow the government to make an assessment after the statute of limitations has expired on a non-fraudulent amended tax return which had been filed to correct a fraudulent original return. The court rejected the government's question-begging approach (which was similar to its approach in this case, see pp. 2-3, *supra*). It instead analyzed the role of a tax return in the regulatory scheme, as explained in this Court's decision in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934). *See Dowell* v. *Commissioner*, 614 F.2d at 1265-67. As a result, the government's assessment was held time-barred (*id.*), notwithstanding seemingly unequivocal statutory language to the contrary.[4]

4. The government also cites the "concurrent sentence" doctrine in a footnote. Gov. Mem. 3, n. 1. But petitioner con

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[4] The government's attempt to distinguish the particular civil cases cited in our petition misses the point of these cases. *See* Gov. Mem. 6, n. 3. These cases apply the civil limitations periods to a particular document purporting to be a "return" or refund claim in accordance with the function of that document in the administrative regulatory scheme. See *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 177-79 (1934); *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 69-71 (1933); *Florsheim Bros. Co.* v. *United States*, 280 U.S. 453, 461-62 (1930). In the criminal context, a fraudulent original return triggers the IRS power to audit and investigate. The filing of an amended return for an unrelated purpose, containing no new falsehood, has no functional impact at all on this administrative investigative process. Consequently, it should not restart the limitations period.

tended below (and asserted in the Petition p. 7, n. 6) that his trial on Counts III and IV of the indictment was prejudiced by the substantial amount of evidence the government introduced on Counts I and II. Since the court of appeals expressly declined to rely on the "concurrent sentence" doctrine, rejecting instead petitioner's claim on its merits, petitioner's contention was not reached below. In these circumstances, the "concurrent sentence" doctrine may not be invoked to bar review. *See Benton* v. *Maryland*, 395 U.S. 784, 797-98 (1968). We note that in *United States* v. *Tager*, 479 F.2d 120, 124 (10th Cir. 1973) — relied on by the government on this issue (Gov. Mem. 3, n. 1) — the court observed that "[t]here is no indication that the alleged errors with respect to Count III in any way affected the conviction on Count II."

CONCLUSION

For the foregoing reasons, as well as those stated in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

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